BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION, Complainant, v. NORFOLK SOUTHERN RAILWAY COMPANY, Defendant.	)	Docket No. 42069 210134

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PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

Complainant Duke Energy Corporation ("Duke"), pursuant to 49 C.F.R. § 1115.3, respectfully petitions the Board to reconsider its Decision served in this proceeding on November 5, 2003, as corrected by Decision served February 3, 2004 (individually and collectively, the "Decision") on the grounds that it is infused with material error. In support of its petition, Duke states as follows:

I. PRELIMINARY POINTS

The Board has found the rates that Defendant Norfolk Southern Railway Company ("NS") established in NSRQ 61880 are unreasonably high. Notwithstanding this finding, the Board has not addressed several issues which it must resolve when a railroad's rates are found to be unreasonable, including the jurisdictional threshold. Neither has the Board ruled upon the single issue most critical to the outcome of Duke's complaint; namely, whether Defendant NS established its unreasonable rates so as to game the Board's rate-making methodology in order to guarantee itself a favorable outcome in this rate case. In the unlikely event that the Board chooses in its next decision not to modify its rate making methodology, which is also under attack elsewhere,[1] Duke reserves its right to challenge the omitted findings when the Board makes them.

Finally, by the time the Board considers this petition, NS will have become revenue adequate. Its new status will undermine NS's repeated claims, which the Board accepted, that it should be permitted to charge very high rates to Duke because it has inadequate revenues. See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 535-36 (1985) ("[C]aptive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs."). Accordingly, the Board, upon reconsideration, must temper NS's differential Duke pricing to reflect NS's improved financial condition.

II. PREFACE AND SUMMARY OF ARGUMENT

Despite their "victory" in this case, the Board's Decision will still leave the electric light customers of the Carolinas paying railroad rates which exceed by several multiples the highest rates ever prescribed by the agency on trainload and unit train movements of coal. This harsh result comes about as the direct consequence of several separate and material errors which the Board committed in its resolution of Duke's complaint.[2] Specifically:

1. The Board erred in refusing to honor its promise in Conrail to prevent NS from raising rates on captive coal in order to make up unanticipated financial shortfalls;

[1] See the Petition for Reconsideration CP&L filed January 20, 2004 of the Board's decision served December 23, 2003, in Docket No. 42072, CP&L v. NS.

[2] Additional lesser errors abound in the Decision, but Duke's petition focuses only on the most consequential.

2. The Board erred in using the RCAF-U to adjust future stand-alone railroad ("SARR") operating costs;

3. The Board erred by using an improper cost of capital for the SARR; and

4. The Board erred in finding that Duke's SARR operated in a fashion unacceptable to its customers and was therefore infeasible, and adopting instead NS's inefficient operating plan, which was premised upon the outputs of a computer model not in evidence.

III. ARGUMENT

1. The Board's Abrogation of its Obligation to Enforce its Conrail Condition Constitutes Material Error

In explaining its refusal to enforce the condition in CSX Corp. and Norfolk Southern Corp. – Control and Operating Leases/Agreements – Conrail Inc., 3 S.T.B. 196, 387 (1998) ("Conrail") which precludes NS from making up unanticipated financial losses caused by its premium purchase of Conrail through rate increases on captive traffic, the Board offered two reasons, neither of which constitutes the rational basis or substantial evidence upon which Board findings and conclusions must be based.

The first reason supplied by the Board for its failure to enforce its Conrail condition is its contention that Duke supplied no evidence to support its allegation that NS was raising its rates to make up for NS's Conrail-caused problems. The Board could only reach this errant conclusion by ignoring completely the extensive evidence (Duke Reply Ex. II-B-1) of Duke's Witness Whitehurst, an eminent rail economist, who appeared as NS's chief financial witness in the Conrail case. Notably, the Decision makes no mention of Witness Whitehurst's detailed and documented demonstration that NS's failure to realize the promised merger economies upon which the Board premised its approval of NS's acquisition of Conrail left NS with over a $2.5 billion cash shortfall at the end of 2001. More pointedly, Witness Whitehurst demonstrated that NS, by its own admission, was attempting to try and solve its Conrail-caused cash shortfall by increasing rates on its shrunken base of captive traffic (id. at 6) and was implored to do so by the financial community. See Duke Op. at I-17 to 18.[3]

The second reason given by the Board for refusing to enforce its Conrail condition is the notion that its Conrail condition was not intended to freeze NS's captive rates "indefinitely." When were the rates on captive traffic to be frozen? NS consummated its Conrail acquisition on June 1, 1999. Between 1999 and 2002, while costs were declining according to STB data, NS repeatedly increased Duke's captive coal rates. See Duke Op. at I-5 to 8. There is nothing indefinite about the size (60 percent) or timing of the assailed increases. In declining to proscribe the increases on the ground that its Conrail condition was not intended to preclude NS from increasing its rates "indefinitely," the Board clearly erred as the assailed increases were both definite and immediate. Most importantly, NS's increases were imposed at the very outset of the 5-year oversight period during which the Board expressly promised, in direct response to valid captive shipper concerns, that it would monitor carefully the interplay between NS's post-Conrail finances and the reasonableness of its captive rates. See Conrail at 385 n.262. The Board's failure to proscribe NS's massive rate increases on the grounds that they violated the Conrail condition was a material error. If the NS increases, which Duke assails, are not violative of Conrail, then the condition is a meaningless one.

[3] To its credit, the Board gave no weight to NS's claims that slackening demand in some traffic sectors motivated the assailed increases. Ebbs and flows of traffic, of course, are routine occurrences on a railroad.

2. The Board Erred in Using the RCAF-U to Reduce Duke's Rate Relief

The Decision gives only cursory treatment to a finding of very substantial consequence to the outcome of this case; namely, its use of the RCAF-U as the proper index for forecasting future changes in SARR operating expenses. See Decision at 32. The Board bases its finding on this issue on two points presented by NS. One of NS's points is that because the SARR's traffic will decline in the future, there will be no productivity from "increasing traffic volume." However, this premise is completely contradicted by Table 1 in the corrected decision, which shows SARR traffic increasing from 79+ million in the first year (2002) to over 88 million tons by 2008, an increase of over 10 percent.[4] NS's declining traffic contention, which the Board found to be "well taken," is flatly wrong according to the Board's own findings.

NS's second point is that the SARR's productivity growth would not be as great as that of the rail industry generally because the SARR is a brand new railroad. The Decision's reliance on this NS point is especially disappointing because the Board had very recently considered the exact same claim by a railroad (Union Pacific) and had rejected it (along with use of the RCAF-U) in Docket No. 42051, Wisconsin Power & Light Co. v. Union Pacific. R. Co. (STB served Sept. 12, 2001) at 106 ("Wisconsin"). There, the Board found that "[i]t is not unreasonable to expect that an efficient railroad built today would realize future productivity gains by utilizing new technology as it is developed." The Board further found that a SARR would experience the same productivity increase that Union Pacific projected for its own coal operations, and it specifically rejected Union Pacific's proposed use of the RCAF-U on the

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[4] In contrast, the product of the annual increases in rail output shown in Table B of Ex Parte No. 290 (Sub-No. 4), Railroad Cost Recovery Procedures – Productivity Adjustment (STB served Jan. 12, 2004), yields a six-year (1997-2002) traffic increase of just under 5 percent.

grounds that the Union Pacific productivity-reflecting index "should produce more reliable projections than the more broad-based RCAF-U." Id.

In its evidence in this proceeding, Duke specifically relied upon the Board's findings in Wisconsin in keeping with the Board's admonition in Ex Parte No. 347 (Sub-No. 3), General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases (STB served March 12, 2001), at 6, that parties should not re-litigate previously resolved issues. See Duke Reb. at III-G-3 to 4. Unlike Union Pacific in Wisconsin, NS did not produce a forecast of its costs for either its coal segment or its operations generally as Duke had requested, and so Duke, consistent with Wisconsin, utilized the RCAF-A, which was the only index reflecting a productivity adjustment that was available to Duke. Under the recited circumstances, the Board's action in the Decision to reverse field and adopt the previously-rejected RCAF-U based on the absence of evidence from Duke on "specific likely productivity improvements" (see Decision at 37) is especially arbitrary and capricious because of the Board's express directive not to "re-litigate" decided points. The Decision's erroneous use of the RCAF-U for SARR costs is compounded by the circumstance that the Board used an adjustment mechanism (the EIA projection) for future SARR revenues that includes an explicit productivity adjustment. This mismatch, alone, wrongly guarantees a bleak financial future for the SARR.

The Board's passing reference to Docket No. 42056, Texas Municipal Power Agency v. The Burlington N. and S.F. Ry. (STB served March 21, 2003) ("TMPA"), is also unavailing as that case was decided after the close of the evidentiary record in this proceeding. Duke cannot be faulted for failing to address precedent which did not exist during the hearing and which conflicts with the precedents which were then in existence. See, e.g., Consolidated

Edison Co. of New York v. FERC, 315 F.3d 316, 323 (D.C. Cir. 2003) ("A new rule may be applied retroactively to the parties in an ongoing adjudication, so long as the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard . . . .").[5] The gravamen of the Board's reasoning on this issue in TMPA was its skepticism that a railroad handling "only unit trains" could expect to participate in industry-wide productivity adjustments.[6] In rejecting Duke's SARR trainload plan and instead adopting NS's inefficient plan, the Board burdened Duke's SARR with operations far more inefficient than those of the real-world NS. Therefore, the SARR's opportunities for future productivity improvements in this case should be greater than the industry average.

Moreover, there is a sound basis to conclude that the SARR's productivity growth will exceed the industry average. The RCAF productivity adjustment is not limited to productivity advances, but instead measures "total factor productivity," meaning all changes in productivity, both positive and negative. See Railroad Cost Recovery Procedures - Productivity Adjustment, 5 I.C.C.2d 434, 465 (1989). Accordingly, the productivity average takes into account all the errors and mistakes that real-world railroads make (e.g., merger problems, failure to hire sufficient personnel, etc.). These are problems that a SARR avoids because it is a least-cost, most-efficient carrier. The agency found that "it would appear that calculations limited to

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[5] Citing Hatch v. FERC, 654 F.2d 825, 835 (D.C. Cir. 1981) ("Courts have uniformly held that for an agency to meet [its obligation under 5 U.S.C. § 554(b)(3)] where it seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party before the agency must be given notice and an opportunity to introduce new evidence bearing on the standard.").

[6] At best, Board's logic in TMPA might justify a refusal to allow the SARR to experience as much productivity growth as the Class I average, but it does not justify the refusal to allow the SARR any productivity gains.

technological productivity would produce larger adjustments to the inflation index since other components of total factor productivity appear to have fallen during the period under consideration." Id. at 466. The SARR, which starts with technology akin to that in present use, and then regularly replaces its assets, is thus well-positioned, as the Board found in Wisconsin, to match the industry "upside" and avoid its "downside." The SARR should thus be able to match, if not exceed, industry average productivity growth.

Duke notes that it is particularly punitive to reduce the rate relief that would otherwise be available in the early years of the DCF analysis, notwithstanding use of the RCAF-U in those years, on the basis of the negative results that mushroom in later years due to the use of the RCAF-U. The Board's approach reduces the rate relief that is otherwise warranted by 76% (in Table 3, the $117.7 million cumulative present value of the overrecovery in 2011 is reduced to $27.9 million by 2021) on the basis of long-term projections, which the Board has implicitly acknowledged are inherently more prone to error.

Accordingly, if the Board remains wedded to the improper use of the RCAF-U to adjust SARR operating expenses, it should at least truncate the DCF analysis to exclude the negative and highly speculative out-years that result from its use of the RCAF-U particularly since, as the Board has recognized, nothing mandates use of a 20-year DCF analysis in the first place.

3. The Cost of Capital Should be Updated in the DCF Analysis

The Decision's DCF analysis reflects the use of an average of the 1999-2001 Class I railroad industry cost of capital of 10.53%, weighted according to the timing of the SARR's expenditures during the construction period. On the other hand, the revenues for the

DCF are adjusted based on the EIA 2003. Thus, the DCF analysis includes an internal mismatch in that it uses capital costs from one period and a revenue adjustor from another. The mismatch is no small thing. In Ex Parte No. 558 (Sub-No. 6), Railroad Cost of Capital–2002 (STB served June 19, 2003), the Board found that the industry cost of capital declined to 9.8% in 2002.[7]

The Decision's use of a cost of capital that correlates unfavorably with the DCF revenues places the SARR, and the shippers it serves, at a financial disadvantage. The disparity between the SARR's cost of capital and that of the industry average represents an impermissible entry barrier since a least-cost, most-efficient carrier should certainly be able to take advantage of the capital refinancing opportunities available to the Class I industry. In past cases such as Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, 6 I.C.C.2d 1, 71-73 (1989), the standard practice of the agency was to have the SARR lock-in interest rates on debt during the construction period, but to base the capital cost of equity on an average that expanded to include post-construction changes, generally through the date of the decision. Significantly, this approach was developed and applied by the agency in periods of generally increasing inflation and costs of capital so as to favor the carriers. In periods of diminishing inflation and costs of capital, especially given the great flexibility of current debt markets, which reflect frequent refinancing, floating interest rates, and lines of credit, a SARR should have at least the same ability as real-world railroads to benefit from diminished investor expectations. Duke further

[7] The 2002 cost of capital decision was served after evidence was submitted, but before the due date for the decision.

notes that the STB has not in any recent cases given any explanation for apparently departing from its prior practice of updating the cost of SARR equity through the date of the decision.[8]

4. The Board Erred in Rejecting Duke's SARR Operating Plan and Compounded its Error by Summarily Accepting NS's Plan

It was material error for the Board to reject Duke's modern, efficient, least-cost SARR operating plan and to accept NS's "worse-than-reality" operating plan. This action, alone, increased annual SARR operating costs by $75 million and added an additional $120+ million to the SARR's roadway investment expense. The Board's error results in the anomaly where an optimally efficient, least-cost railroad has higher operating costs than the inefficient NS itself.[9]

A. The Board's Criticisms of Duke's SARR Operating Plan are Unsupported by Probative Evidence

The Decision provides three reasons for its rejection of Duke's operating plan:

1. Duke's operating plan fails to provide SARR customers with the quality and quantity of the rail service which they require (Customer Service);

2. Duke's operating plan requires the staging of trainloads made up of cars from different mines, but its SARR

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[8] Duke's electronic workpapers, submitted under seal herewith, show the effect on the corrected Decision's DCF analysis of updating the cost of analysis under different scenarios. "DCF_2002Equity.123" calculates the cost of equity in accordance with the agency's prior practice. "DCF_2002Debt.123" calculates the cost of equity in accordance with "DCF_2002Equity.123," but assumes that the SARR refinances all of its debt in 2002 at the prevailing cost of debt. "DCF_2002CostofCapital.123" calculates the cost of capital according to the Class I average, i.e., SARR equity and debt investors are treated as if they have invested in a Class I railroad in 2002 (and the debt-equity ratio is weighted accordingly). All three approaches improve the SARR's financial results.

[9] The operating costs of the SARR are 15.2 mills per ton-mile whereas NS's variable costs (which, unlike SARR operating costs, include a significant return on investment) are 11.2 mills per ton-mile (as calculated by Duke) and 13.0 mills per ton-mile (as calculated by the Board in CP&L).

configuration fails to provide any facilities for staging trains (Inadequate Facilities); and

3. Duke's trainload-only operating plan forces SARR customers to change the sources of their coal purchases (Homogeneous Trains).

Each of the three reasons upon which the Decision relies for its rejection of Duke's operating plan is both unsound and unsupported by evidence.[10]

(1) Customer Service

The first reason which the Decision enunciates in support of its rejection of Duke's efficient SARR operating plan is its finding that Duke's plan does not provide the SARR customers with either the quality or quantity of coal transportation services which they require. For this reason, Duke's plan is said to violate the stand alone principle that the SARR must accommodate the "preferences of shippers." See Decision at 31.

When the Decision's finding on the subject of customer preference is measured against the supporting evidence, its conclusion that Duke's SARR fails to satisfy the requirements of its customers is clearly unsupported by probative evidence.[11] As the Decision observes, Duke's SARR operates only trainloads of 90 to 115 cars. Id. at 30. The Decision then goes on to recite that NS's real-world service differs from the SARR's in terms of its train sizes with some trains exceeding 115 cars and other trains with fewer than 90 cars, and some coal

[10] It merits note that only a minuscule amount of the vast number of pages of evidence devoted to SARR operations treated the three points which the Decision found to be dispositive of the operating cost issue.

[11] See Johnson v. Office of Thrift Supervision, United States Dept. of the Treasury, 81 F.3d 195, 201 (D.C. Cir. 1996) ("in evaluating the evidence underlying an agency finding, we look to see whether there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'") (quoting Seidman v. OTS, 37 F.3d 911, 924 (3d Cir. 1994)).

(18%) moves in less-than-trainload ("LTL") service. From these accurate descriptions of train sizes, the Board somehow then moves to the inaccurate conclusion that Duke's SARR customers receive neither the quality or quantity of the coal transportation services they require. Coal receivers at Skyland and Catawba, NC are singled out as illustrations of why Duke's SARR operating plan fails to provide transportation service commensurate with customer requirements.

The Decision errs grievously in concluding from the fact that train sizes on Duke's SARR are different than those on NS's real-world system that the SARR's different train sizes violate the customer preference "principle." See Decision at 31. This error may have been enabled by the Board's mistaken belief as to the dimension of NS's LTL service (i.e., 18%).[12] In any event, the record is devoid of any evidence as to what train sizes the SARR customers prefer. Each customer served at destination by the SARR can unload trainloads and each customer receives the exact annual amount of coal from the SARR that it receives from NS. Under Duke's plan, no customer is required to accept shipments that are either larger or smaller than it is both capable of handling and, in fact, receives from NS today. Most crucially, every SARR customer receives its exact annual coal requirements from each mine origin from which it purchases coal.

The Decision's selection of the SARR customers at Catawba and Skyland, NC as proof of failed customer service illustrates the Board's misunderstanding of Duke's SARR operating plan. As heretofore noted, the Decision errs when it concludes that the utility at Skyland receives too much coal and the one at Catawba not enough. The "utility at Catawba,

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[12] The Decision's finding that NS moves 18 percent of the SARR's traffic in LTL service is erroneous because it is based on the manner in which NS prepares its waybills rather than the manner in which NS trains actually move. As explained infra, NS regularly moves cars with LTL waybills in trainload service.

NC" is Duke! Duke can attest to the fact that the SARR's standardized train sizes are eminently acceptable and that NS's varying sized trains are employed largely for NS's own operating convenience.[13] Moreover, Duke can assure the Board that the SARR transports Catawba's full annual coal requirements in a sequence fully satisfactory to its needs and requirements as a coal transportation customer.

The Decision's use of Skyland as illustrative of the fact that Duke's SARR plan fails to meet customer requirements is even more misdirected. Skyland is served by the residual NS, not the SARR. The NS moves Skyland coal in trainloads which it breaks up near destination for delivery to Skyland. There would be no changes under Duke's plan. Duke's SARR would long-haul the Skyland coal from origin to interchange and NS would deliver it as it does today. The Skyland customer would notice no difference in service between NS's current operations and those under Duke's SARR operating plan. In summary, it was manifest error for the Board to conclude that Duke's different train sizes resulted in inadequate customer service, especially where there was not one shred of evidence in the record on the train size preference or lack thereof of coal consumers.

(2) Inadequate Facilities

In a passage that truly defies credulity, the Decision (id. at 32) next condemns Duke's SARR operating plan as "unworkable" because it calls for the staging or assembly of trainloads formed from cars from separate mines when, in fact, Duke's SARR has no "staging or gathering yards" to make up trains with cars from different mines. As the Decision states clearly,

[13] However, the claim in the Decision (id. at 31) that Catawba receives trains up to 140 cars long is simply wrong. Duke's Catawba facility cannot receive 140 car trains.

elsewhere, Duke's SARR does not assemble trains in gathering yards, but operates only in trainload service from origin to destination or interchange. The Board knows or should have known that Duke's SARR does not pretend to assemble a trainload made up of coals from several separate origin mines. In faulting Duke's SARR for its inability to perform an operation which it does not even hold itself out to perform, the Board went out of its way to erect a strawman – i.e., train staging – and then knock it down. Duke's SARR operating plan should not have been so faulted.

(3) Homogeneous Trains

While the Board notes at the outset that a central feature of Duke's SARR operating plan is that the SARR moves trainloads only from one mine to one destination or interchange, the Board, in discussing SARR operations, describes this hallmark of Duke's SARR operating plan as "Duke's unstated assumption." The Decision then focuses upon this modern, operational efficiency and draws from the fact of Duke's trainload service the conclusion that Duke's plan is "fatally flawed." See Decision at 35. It is flawed, according to the Board, because the SARR's customers will be forced by Duke's homogeneous trainload plan to "accept a change in their coal supply sources."

The Decision's finding that SARR customers will be forced to change their sources of coal by Duke's operating plan is sheer speculation. Under Duke's plan, for example, all of a customer's Steer Branch mine purchases in the peak week come in a single trainload whereas NS delivers the exact same coal purchases in three mixed trainloads. Each year, both the SARR and the incumbent NS deliver the exact same amount of coal from the exact same origins. Indeed, an essential criterion that Duke's SARR configuration and operating plan were designed to satisfy was that every customer would receive, from each served origin and interchange point, precisely the volumes of coal that the customer was projected to purchase during the period in question. In other words, the only difference between the way the SARR customers will receive their preferred coals under the Duke and NS operating plans is one of timing: Duke's plan would deliver trainload quantities of coal for blending at the plant, while NS's plan (at great and needless expense) accomplishes "blending in the trainload." Over time, though, each shipper's coal piles would receive the same mixture of coals from the sources chosen by the shipper, under either plan.[14]

After reaching the erroneous finding that Duke's SARR operating plan requires the SARR customers to accept coal from mines different than those from which the customers purchased the coal, the Decision discusses at some length why such involuntary changes in coal supply sources might be unacceptable to coal consumers. The Decision's discussion of facts concerning coal qualities and prices, which facts appear nowhere in the record, is misplaced because Duke's plan does not require customers to accept high sulfur coal when they purchased low sulfur coal nor are they required to accept low BTU coal when they bought high BTU coal. Doubtlessly a coal buyer who bought low sulfur coal would not willingly accept rail deliveries of a high sulfur substitute, but there is no prospect of this happening under Duke's plan. It bears repetition that during the course of the year, the SARR and NS deliver the same quantities of coal

[14] The Board's erroneous understanding as to how Duke's operating plan works appears, in part, to be based upon a misuse of Duke's peak week capacity data. This data cannot be extrapolated from a peak week basis, as the Board attempts in Table 1 (<u>see</u> Decision at 34), to an annual basis to reach findings on total mine loadings or shipper receipts. Thus, it is error to find from a one week sample that a customer did not receive its coal requirements for an entire year or that a particular mine did not furnish the customer all of the coal which the customer purchased from that mine.

from the same origins. The Decision erred when it rejected Duke's operating plan on the basis of its mistaken conclusion that the SARR forced customers to take coals other than the ones that they required and purchased. Because the Board took evidence presented by Duke solely to illustrate that the SARR had the operational capacity to function efficiently at peak traffic levels and misused it to make conclusions on annual SARR customer coal receipts, the Board erred.

In relying on "facts" for which there is no evidentiary support, an agency fails to meet "its obligation to develop an evidentiary basis for its findings":

> Conclusory statements such as those here provided do not fulfill the agency's obligation. . . . The Board's findings must extend to all material facts and must be documented on the record, lest the "haze of so-called expertise" acquire insulation from accountability.

In re Sang Su Lee, 227 F.3d 1338, 1334-35 (Fed. Cir. 2002).[15]

In the final analysis, if on reconsideration the Board were to uphold its rejection of Duke's operating plan and SARR configuration, the Board would have, for the first time, transformed what in the past has been a reasonable "reality check" (a hypothetical stand alone carrier must be able to offer the same or better service as the incumbent before it can be evaluated as an optimized competitor for the incumbent's traffic) into a straightjacket that effectively ties the stand alone carrier to all of the inefficiencies of the incumbent, precluding the

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[15] Citing, inter alia, Baltimore and Ohio R.R. Co. v. Aberdeen & Rockfish R.R. Co., 393 U.S. 87, 91-92 (1968) (absent "administrative decisions based on substantial evidence and reasoned findings – which alone make effective judicial review possible," administrative actions "would become lost in the haze of so-called expertise" and "[administrative expertise would then be on its way to becoming 'a monster which rules with no practical limits on its discretion'") and Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1983).

very optimization and rationalization that are the theoretical underpinnings of the stand alone cost standard.

There is no support for such a result in any of the prior cases relied upon by the Board. Thus, in West Texas Utilities Co. v. Burlington N. R.R., 1 S.T.B. 638 (1996), the railroad provided detailed evidence that the train sizes posited by the shipper's operating plan were operationally problematic and inconsistent with certain shippers' contracts that specifically required shorter trains, and in one instance with the limitations imposed by a specific originating carrier. No such evidence has been presented in this case, and as noted above, Duke's proposed train sizes are well within the range of sizes actually accepted by each shipper and hypothetical connecting carrier (NS) today. In McCarty Farms, Inc. v. Burlington Northern, Inc., 2 S.T.B. 460 (1997), the railroad demonstrated that the shipper's operating plan improperly assumed even daily loadings throughout the year, even though the grain traffic in question was highly seasonal, and that it also assumed car-loading factors that were unreasonably optimistic. Again, there is no such evidence in this case. Finally, in Docket No. 42022, FMC Wyoming Corp. v. Union Pacific R.R. (STB served May 12, 2000), the defendant carrier demonstrated with particularity that several of its unit train coal customers insisted on having their railcar fleets assembled into longer trains, exceeding the maximum train size posited by the shipper's operating plan. Again, NS presented no such evidence in this case.

The Board's rejection of Duke's operating plan for the SARR, despite its announced policy of using the shipper's operating plan if it is feasible and realistic, is completely unsupported by substantial evidence of record, and therefore must be reversed.

B. The Board's Adoption of NS's High Cost SARR Operating Plan is Indefensible

After rejecting Duke's SARR operating plan for reasons both strained and contrived, the Decision summarily (i.e., in 2 1/2 lines; see Decision at 35) adopts NS's alternative SARR operating plan without discussion. As a consequence, the SARR's operations are more inefficient and more costly than those of the real-world NS – a circumstance which cannot conceptually be possible.

The real-world NS uses a "mine run" operation whereunder a single crew gathers cars from multiple mines before delivering those cars to a gathering yard for assembly into a trainload for movement to a destination. However, NS's operating plan for the SARR, summarized in NS Reply Exhibit III-C-3, always defines a train according to the number of cars included on NS's revenue waybill. This assumption causes the locomotives (and crew) to move the cars from a gathering yard to an individual origin, and then back to the gathering yard with each train using its own crew for a single round trip between the gathering yard and mine origin. This yields an extraordinarily large number of small trains and an overstatement of the SARR's crew requirement. The resulting, massive inefficiency far surpasses even that of the real-world NS. For example, NS's SARR operating plan causes over 800,000 tons to move from origins to gathering points each year in trains made up of less than 20 cars.[16] NS's SARR operating plan

[16] See NS Reply electronic workpaper "LUMs and Carmiles (NS) v2.xls," Level "Line Haul GTM," column S x column L (for those lines where column K is less than 20 cars). In particular, Line 288 shows the movement between Pevler, VA and Hurt, VA, covering a total annual volume of 30,000 tons, was waybilled as approximately 32 LTL shipments of approximately 11 cars each. NS's operating plan, which the Board endorsed, assumes that the SARR would operate 32 trains of 11 cars and 2.0 high-horsepower locomotives each for the 130 miles from the Devon gathering yard to Pevler and back to the Devon gathering yard.

grossly overstates the number of trains required, and thus the number of locomotives and associated costs, as well as the needed facilities.

Moreover, what NS (and thus the Board, through its adoption of NS's operating plan) treated as an "LTL" movement has nothing to do with how the train itself actually moved. Instead, the LTL classification was a clerical function of the manner in which NS prepared the waybill for each movement, as shown on NS Reply electronic workpaper "SMNSMB01 Train Length Analysis v3.xls," level "All train lengths." NS's operating plan arbitrarily treated every waybilled shipment of less than 69 cars (some as few as 9 cars) as an LTL shipment requiring a separate train.[17] As a result, each shipment which NS waybilled as LTL was treated as a separate train from the gathering yard to the origin and the return. NS did not demonstrate – and did not even try to claim – that the number of cars on a waybill reflects the number of cars actually on the train. In fact, the real-world NS regularly moves single trainloads of coal comprised of groups of shipments moving under different waybills.

The Decision improperly accepted NS's operating plan without addressing the obvious inefficiencies in NS's approach and without addressing the fact that it results in mine gathering operations that are far less efficient than even NS's current gathering operations, as confirmed by the comparison of SARR and NS operating expenses. NS's operating plan does extreme violence to stand-alone principles, and the Board's uncritical acceptance of it was material error. This error is compounded by the fact that NS's entire evidentiary presentation on SARR operations is predicated on the output of its RDCAM computer program which, as the

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[17] NS's plan also arbitrarily allowed larger train sizes for three movements that increased the LTL train size to 81 cars. See NS Reply electronic workpaper "LUMs and Carmiles (NS) v2.xls," Level "Line Haul GTM," column K.

Decision notes correctly, is not part of NS's evidence. See Decision at 47 n.62. The law is emphatic that no weight can be given to any of NS's SARR operating evidence under such a circumstance. See TMPA at 68; United States Air Tour Assoc. v. FAA, 298 F.3d 997, 1008 (D.C. Cir. 2002); United States v. Russo, 480 F.2d 1228, 1241 (6th Cir. 1973). In uncritically accepting NS's SARR operating evidence, the Board erred. This error is the primary reason why the lion's share of NS's rate increases were accepted by the Board.

CONCLUSION

The erroneous findings in the Board's initial Decision, which in part were enabled by technical error, have been perpetuated by the several substantive errors identified in this petition. These errors culminate in an ultimate finding which is enabling a monopoly railroad to charge $17.21 to haul one ton of coal 325 miles in trainload service (i.e., High Pwr. Mtn. to Belews Creek) or 52.9 mills per ton-mile. Let it be clear that the victim of this miscarriage of regulatory justice is not Duke Energy, but rather the electric ratepayer of the Carolinas. Perhaps the Board's most egregious error of all is its failure to give any consideration to the requirements of the public interest. Had the Board considered the public interest, it would have been impossible to reach the conclusions it did.

Respectfully submitted,

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Date Due: February 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of February, 2004, I have caused a copy of the foregoing Petition for Reconsideration to be served, by hand, upon counsel for NS as follows:

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